CANADA V PEIGAN: HAS THE FEDERAL COURT GIVEN IN TO TEMPTATION?

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The Federal Court of Appeal's decision in Canada v Peigan is a landmark departure from its longstanding jurisprudence in relation to the Federal Court's limited jurisdiction over the provinces. The Court's primary concern in this case was to hold a province to its contractual undertaking to a First Nation to attorn to the Court's jurisdiction. The Court preferred contractual over legislative intent on these facts, and exceeded its jurisdiction in the process. Peigan is the first case in which the Court has assumed jurisdiction over a province under section 17 of the Federal Courts Act. Until Peigan, the Court had consistently rejected section 17 as a source of such jurisdiction. Peigan also marks a novel development for the doctrines of Crown immunity and the honour of the Crown.

La décision rendue par la Cour d'appel fédérale dans l'affaire Canada v Peigan First Nation s'écarte notoirement de sa jurisprudence constante concernant la compétence limitée de la Cour fédérale à l'égard des affaires des provinces. En l'espèce, la principale préoccupation de la Cour était d'obliger une province à honorer ses engagements contractuels envers une Première Nation de reconnaître la compétence de la Cour. Elle a préféré l'intention des contractants à celle du législateur et, ce faisant, a excédé les limites de sa compétence. Il s'agit de la première affaire dans laquelle la Cour a reconnu la compétence d'une province en vertu de l'article 17 de la Loi sur les Cours fédérales. La Cour avait jusqu'alors toujours refusé de fonder cette compétence sur l'article 17. Cette affaire constitue en outre une nouvelle évolution des doctrines de l'immunité de la Couronne et de l'honneur de la Couronne.

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1. Introduction

Canada v Peigan is a landmark departure from the Federal Court's longstanding jurisprudence in relation to its limited authority over the provinces.[2] At issue was the novel question of whether the Court has jurisdiction over a province that purported to attorn to the Court's jurisdiction in a tripartite agreement, in this case with a First Nation and Canada. The rule had been that parties cannot expand the Court's jurisdiction in this way. For statutory courts, jurisdiction is a function of legislative, not contractual, intention. Yet the contractual backdrop in *Peigan* created a unique tension between an otherwise straightforward question of jurisdiction, with considerations of access to justice and the honour of the Crown. Upholding Crown immunity would have been at the expense of the Province's clear contractual undertaking to the First Nation. In assuming jurisdiction, however, the Court preferred contractual over legislative intent, and exceeded its authority in the process. The decision serves as a cautionary tale. If jurisdiction is based on the Court's subjective sense of fairness, then it becomes untethered from its statutory moorings.

2. Overview of Federal Court Jurisdiction

The Federal Court was created in 1971 pursuant to Parliament's authority under section 101 of the *Constitution Act, 1867* to establish "any additional Courts for the better Administration of the Laws of Canada."[3] The Court replaced the Exchequer Court, which was established in 1875, with exclusive jurisdiction over claims brought against the federal Crown.[4] The Federal Court differed from the Exchequer Court most notably in its new and exclusive jurisdiction to review decisions of federal boards, commissions

2 2016 FCA 133, 483 NR 63, leave to appeal to SCC refused, 37084 (22 December 2016) [*Peigan*].

3 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 101.

4 The Court's history is reviewed in detail in Ian Bushnell, *The Federal Court of Canada: A History, 1875–1992* (Toronto: Osgoode Society for Canadian Legal History, 1997). See also Brian A Crane, "Constitutional Restraints on the Federal Court in Relation to Crown Litigation" (1993) 2:1 NJCL 1; Stephen A Scott, "Canadian Federal Courts and the Constitutional Limits of Their Jurisdiction" (1982) 27:2 McGill LJ 137.

and tribunals.[5] The Court was also separated into a trial division and an appeal court. In 2003, these divisions formally became two separate courts: the Federal Court and the Federal Court of Appeal.

In *ITO-International Terminal Operators Ltd v Miida Electronics*, the Supreme Court of Canada consolidated the common law relating to Federal Court jurisdiction into a three-part test ("the ITO test") that continues to govern:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
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> 3. The law on which the case is based must be a "law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.[6]

The first branch of the test reflects the Court's status as a statutory court whose powers are conferred entirely by Parliament.[7] The focus of this discussion is on the relationship of the first branch of the ITO test to the provinces.[8] The second and third branches of the test reflect the Court's constitutional limits, which prevent it from venturing into provincial matters. Parliament cannot do indirectly through the Federal Court what it cannot do directly under the constitutional division of powers.[9]

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5 An early discussion of the Court's new powers in this regard is found in DJ Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973) 23:1 UTLJ 14.

6 *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at 766, 28 DLR (4th) 641.

7 For a discussion of the concepts of "statutory" and "inherent" jurisdiction in relation to the Federal Court, see Nicolas Lambert, "The Nature of Federal Court Jurisdiction: Statutory or Inherent?" (2010) 23:2 Can J Admin L & Prac 145. The historic roots of the jurisdiction of the provincial superior courts in Canada is discussed in JT Irvine, "*The Queen's Bench Act, 1998*: Old Wine in New Bottles" (2003) 66:1 Sask L Rev 63.

8 It is beyond the scope of this discussion to fully explore the second and third branches of the ITO test in relation to the provinces. A brief discussion of the Federal Court of Appeal's application of those branches in *Peigan* is provided in n 33, *infra*.

9 As stated by Lord Haldane in *Reference Re Board of Commerce Act and Combines and Fair Prices Act, 1919*, [1922] 1 AC 191, (1921) 91 LJPC 40 at para 11: "their Lordships think that sec. 101 of the British North America Act … cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures".

The Court's statutory jurisdiction is conferred primarily by the *Federal Courts Act*.[10] The *Federal Courts Act* grants jurisdiction over certain parties, particularly the Crown and "subjects" of the Crown, and in relation to various matters falling within Parliament's jurisdiction. Section 17 grants concurrent jurisdiction in relation to claims brought by and against "the Crown". Section 18 confers exclusive jurisdiction to review the decisions of federal boards, commissions and tribunals. Section 19 is the only provision of the *Federal Courts Act* that expressly grants jurisdiction over the provinces. It confers such jurisdiction where provinces have accepted the Court's jurisdiction through corresponding provincial legislation, and in relation to "controversies" between the Crowns.[11] Sections 20, 22 and 23 grant jurisdiction over disputes between certain parties, namely, "subject and subject as well as otherwise," in relation to such diverse federal matters as intellectual property, navigation and shipping, bills of exchange, promissory notes, aeronautics and interprovincial works and undertakings.[12]

Section 17 of the *Federal Courts Act* is central to this discussion because it was relied on by the Court in *Peigan* as conferring jurisdiction over the Province. It will be helpful to briefly review the provision's various parts. Subsections 17(1) and (2) confer concurrent jurisdiction to grant relief against the Crown in relation to certain types of cases, including those involving land, contracts and damages. The Court in *Peigan* sourced jurisdiction over the Province in subsection 17(3), which grants exclusive jurisdiction in certain situations where "the Crown and any person" have agreed in writing to the Court's jurisdiction. Subsection 17(4) grants concurrent jurisdiction in relation to conflicting claims against the Crown. Subsection 17(5) grants concurrent jurisdiction over actions brought by the Crown and actions brought against Crown servants and officers. Finally, subsection 17(6) confirms that the Court is without jurisdiction over matters in respect of which Parliament has conferred jurisdiction on the provincial courts.

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10 RSC 1985, c F-7.

11 All provinces except Prince Edward Island have enacted such legislation: *Federal Courts Jurisdiction Act*, RSBC 1996, c 135; *Judicature Act*, RSA 2000, c J-2; *The Federal Courts Act*, RSS 1978, c F-12; *The Federal Courts Jurisdiction Act*, RSM 1987, c C270; *Courts of Justice Act*, RSO 1990, c C 43; *An Act respecting the Supreme Court of Canada and the Exchequer Court of Canada*, SQ 1906, c 6; *Federal Courts Jurisdiction Act*, RSNB 2011, c 157; *Supreme and Exchequer Courts of Canada*, RSNS 1900, c 154; *Federal Courts Jurisdiction Act* RSN 1990, c F-7. Section 19 of the *Federal Courts Act* only contemplates jurisdiction over controversies between Canada and a province, or as between provinces. It does not contemplate jurisdiction over disputes between provinces and subjects: see *Union Oil Co v R*, [1974] 2 FC 452, 52 DLR (3d) 388 [*Union Oil*], aff'd [1976] 1 FC 74, 72 DLR (3d) 81.

12 Section 21 dealt with citizenship matters and was repealed in 2014.

Parliament gave section 17 a facelift in 1992 by amending the Court's jurisdiction over claims against the Crown from being exclusive to concurrent.[13] Exclusive jurisdiction over the Crown had created a problem for multiparty disputes, where plaintiffs were required to sue the Crown in Federal Court, but had to proceed separately against other defendants in the provincial superior courts. The switch to concurrent jurisdiction was intended to remedy this problem. It allows plaintiffs to proceed against the Crown and other defendants together in provincial superior courts.

3. Crown Immunity

The Federal Court's statutory jurisdiction is subject to the rule of construction that the Crown is presumptively immune from the application of statutes. That presumption is stated by Peter Hogg, Patrick Monahan and Wade Wright as follows:

> The rule is that the Crown is not bound by statute except by express words or necessary implication. What this means is that general language in a statute, such a "person" or "owner" or "landlord", will be interpreted as not including the Crown, unless the statute expressly states that it applies to the Crown, or unless the context of the statute makes it clear beyond doubt that the Crown must be bound.[14]

This presumption has been incorporated into the first branch of the ITO test for determining whether the Federal Court has statutory jurisdiction over the provinces. In *Canada v Toney*, the Federal Court of Appeal considered whether section 22 of the *Federal Courts Act* confers such jurisdiction.[15] That section grants jurisdiction over disputes in relation to navigation and shipping between certain parties, namely, "subject and subject as well as otherwise."[16] At issue was whether the phrase "as well as otherwise" discloses an intention to bind the provinces.[17]

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13 *Crown Liability and Proceedings Act*, SC 1990 c 8, proclaimed in force on February 1, 1992 C Gaz 1992 II 280.

14 Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Thomson Reuters, 2011) at 398 [Hogg, Monahan & Wright]. Section 17 of the federal *Interpretation Act*, RSC 1985, c I-21, provides that "No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment." In *Manitoba v Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91, 358 DLR (4th) 563, the Federal Court of Appeal considered whether Crown immunity exempted the provinces from the federal *Copyright Act*, RSC 1985, c C-42. The Supreme Court of Canada recently reviewed the principles governing the doctrine of Crown immunity in *Canada (AG) v Thouin*, 2017 SCC 46, [2017] 2 SCR 184.

15 2013 FCA 217, 368 DLR (4th) 361 [*Toney*].

16 *Federal Courts Act*, *supra* note 10, s 20(1).

17 The Federal Court had previously confirmed that the provinces cannot be considered a "subject". For example, in *Lubicon Lake Band v R*, [1981] 2 FC 317 at 7, 117

The Court's majority cautioned that "a clear Parliamentary intention … is required to displace" the presumption of Crown immunity, which may be rebutted only where the Court is "irresistibly drawn to that conclusion through logical inference."[18] It held that the definition of the "Crown" under section 2 of the *Federal Courts Act* as "Her Majesty in right of Canada"[19] was "contraindicative of a clear intention to bind the provinces;"[20] nothing in the *Federal Courts Act*, other than section 19, drew the Court to conclude "irresistibly" that Parliament "intended to bind the provincial Crown by express language or … logical inference."[21] This reasoning is illustrative of the Court's historic fidelity to its statutory limits in relation to the provinces.

4. Canada v Peigan

Peigan involved a claim brought by Chief M Todd Peigan on behalf of the Pasqua First Nation against Saskatchewan and Canada in relation to Saskatchewan's refusal to sell the First Nation certain provincial Crown lands pursuant to a Treaty land entitlement ("TLE") agreement. The agreement was entered into by the First Nation, Canada and Saskatchewan in 2008, and was modelled on the 1992 Saskatchewan TLE Framework Agreement. These agreements were intended to fulfill Canada's outstanding obligations to provide reserve lands under the numbered Treaties. Saskatchewan is party to the agreements because of its constitutional obligation to Canada under paragraph 10 of the *Natural Resources Transfer Agreement, 1930* ("*NRTA*") to provide Canada with unoccupied Crown lands so that it can fulfill its outstanding Treaty obligations.[22]

Under the agreements, entitlement Bands are provided monetary compensation with which they can purchase—on a "willing seller/willing buyer" basis—federal or provincial Crown lands, or privately held lands, as a means of satisfying their outstanding land entitlements. The agreements contain detailed provisions governing the sale of Crown lands and the process for transferring purchased lands to reserve status. They are a modern, contractual alternative to the constitutional model for satisfying TLE under the Treaties and the *NRTA*.

DLR (3d) 247, Justice Addy stated forcefully that "by no stretch of the imagination" could the Crown in right of a province be considered as a "subject" of the Crown in right of Canada [*Lubicon*].

18 *Toney*, *supra* note 15 at para 7 (Near JA).

19 *Federal Courts Act*, *supra* note 10, s 2.

20 *Toney*, *supra* note 15 at para 15.

21 *Ibid* at para 18. Justice Sharlow dissented in the result, but not in relation to the presumption of provincial Crown immunity from the *Federal Courts Act*.

22 *Alberta Natural Resources Act*, SC 1930, c 3; *Manitoba Natural Resources Act*, SC 1930, c 29; *Saskatchewan Natural Resources Act*, SC 1930, c 41.

Saskatchewan brought a motion to strike the claim for want of Federal Court jurisdiction. The motion would no doubt have been granted, but for one unique twist. The TLE agreements contain a clause (the "attornment clause") under which the parties agreed that disputes arising out of the agreements would be within exclusive Federal Court jurisdiction. The Court's challenge in *Peigan* was to determine whether it was without jurisdiction over the Province notwithstanding the attornment clause. Never before had the Court wrestled with a contest between provincial Crown immunity and any such contractual undertaking. The TLE agreement was signed as a result of an unfulfilled Crown obligation. The Crown, in this case the Province, was now relying on Crown immunity in the face of one of the agreement's provisions.

The Federal Court dismissed the Province's motion in a brief, five-paragraph decision. The Federal Court of Appeal provided a more fulsome analysis, and held that the Court had jurisdiction over the Province and the majority of the subject matter of the claim. Justices Gleason and Near wrote the majority opinion and Justice Pelletier wrote concurring reasons. The following discussion will focus on the Federal Court of Appeal's majority decision.

A) The Statutory Grant

For the first time in its history, the Court has assumed jurisdiction over a province under section 17 of the *Federal Courts Act*, specifically paragraph 17(3)(b).[23] That provision states that the Court has exclusive jurisdiction over "any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined" by the Court.[24] The Court in *Peigan* accepted that the attornment clause is an agreement in writing contemplated by paragraph 17(3)(b), which thereby serves as a statutory grant of jurisdiction over the Province. Closer inspection reveals a number of problems with that conclusion.

Jurisdiction must be over both the subject matter and the parties to the dispute.[25] There is no question that section 17 grants jurisdiction over claims against the *federal* Crown. Section 2 of the *Federal Courts Act* defines

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[23] *Federal Courts Act*, *supra* note 10.

[24] Section 17(3)(a), *ibid*, provides that the Court has exclusive jurisdiction to determine "an amount" to be paid where the "Crown and any person have agreed in writing" for the Court to make that determination.

[25] *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at para 44, [2010] 3 SCR 585 [*TeleZone*] [footnotes omitted]; *Toney*, *supra* note 15 at para 10; *Kusugak v Northern Transportation Co*, 2004 FC 1696 at para 42, 247 DLR (4th) 323; *Greeley v "Tami Joan" (The)* (1996), 113 FTR 66 at 75–76, 7 WDCP (2d) 302 [*Greeley*]; *Blood Band v Canada*, 2001 FCT 1067 at para 21, 2001 CFPI 1067 [*Blood Band*].

the Crown as "Her Majesty in right of Canada." The provinces are absent from that definition. Until *Peigan*, the Court had consistently held that this limited definition of the Crown meant that section 17 was not intended to bind the provinces.[26] In *Greeley v "Tami Joan" (The)*, the Federal Court went so far as to say that the provinces are "implicitly excluded" from the scope of section 17 on that basis.[27]

The Court in *Peigan* distinguished its previous section 17 jurisprudence on the basis that those cases did not specifically consider paragraph 17(3)(b). However, as with section 17 generally, paragraph 17(3)(b) specifically binds the Crown, which under the *Federal Courts Act* is limited to the federal Crown. If Parliament had a contrary intention under paragraph 17(3)(b), one would expect it to be stated expressly.[28]

Reference to "any person" in paragraph 17(3)(b) is the only conceivable textual basis for finding jurisdiction over the provinces. However, it is clear that the term "person" in a federal statute is insufficient to bind the provinces.[29] Moreover, an anomaly would occur if "any person" in paragraph 17(3)(b) was construed as binding the provinces, since the same term is

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[26] *Union Oil*, *supra* note 11; *Lubicon*, *supra* note 17; *Canada v Joe*, [1984] 1 CNLR 96, 49 NR 198 (FCA), aff'd [1986] 2 SCR 145, 69 NR 318; *Saugeen Band of Indians v Canada*, [1992] 3 FC 576, [1992] FCJ No 813 at para 27 (QL); *Blood Band*, *supra* note 25 at paras 15–21, 26; *Vollant v R*, 2008 FC 729 at para 5, 393 NR 183, aff'd 2009 FCA 185 at para 5, 393 NR 183 [*Vollant*]; *Innus de Uashat Mak Manu-Utenam v Canada*, 2015 FC 687 at para 19, 482 FTR 31, aff'd 2016 FCA 156 at para 8, 484 NR 61; *Kelly Lake Cree Nation v Canada*, 2017 FC 791, 283 ACWS (3d) 2.

[27] *Greeley*, *supra* note 25 at 74. In *Toney*, *supra* note 15 at para 15, a majority of the Federal Court of Appeal held that the limited definition of the "Crown" in the *Federal Courts Act* was "contraindicative" of a Parliamentary intention to bind the provinces.

[28] As with section 17, the Court has historically refused to exercise jurisdiction over the provinces under the subject matter provisions of the *Federal Courts Act*. See e.g. *Trainor Surveys (1974) Ltd v New Brunswick*, [1990] 2 FC 168, 29 CPR (3d) 505, (no jurisdiction over the provinces under section 20 in relation to copyright disputes); *Toney*, *supra* note 15 (no jurisdiction over the provinces under section 22 in relation to navigation and shipping); *Canadian Javelin Ltd v Newfoundland*, [1978] 1 FC 408, 77 DLR (3d) 317 (FCA) (no jurisdiction over the provinces under section 23 in relation to the subject matters of that provision, including, *inter alia*, bills of exchange and promissory notes).

[29] Hogg, Monahan & Wright, *supra* note 14 at 398; *Interpretation Act*, *supra* note 14, s 35; *Alberta Government Telephones v Canadian Radio-Television & Telecommunications Commission*, [1989] 2 SCR 225 at 276, 282, 61 DLR (4th) 193 [*Alberta Government Telephones*]; *Canadian Broadcasting Corporation v Ontario (AG)*, [1959] SCR 188 at 198, 16 DLR (2d) 609; *Canada v Prince Edward Island*, [1978] 1 FC 533, 83 DLR (3d) 492.

found in subsection 17(2), which the Federal Court has consistently rejected as a source of such jurisdiction.[30]

Is a clear Parliamentary intention to bind the provinces otherwise disclosed by the statute's terms, or by an irresistible logical inference, as required under the doctrine of Crown immunity? Section 19 suggests not. That provision expressly binds the provinces where they have accepted the Court's jurisdiction through corresponding provincial legislation.[31] It seems implausible that Parliament would have intended *impliedly* to allow the provinces to submit to the Court's jurisdiction under paragraph 17(3)(b), when it expressly addressed that issue under section 19.[32] Furthermore, if the provinces can attorn by simple agreement under paragraph 17(3)(b), then the requirement of provincial legislation under section 19 becomes redundant.

Justices Gleason and Near grounded jurisdiction over the provinces based on the conferral of *exclusive* jurisdiction under paragraphs 17(3)(a) and (b). They correctly observed that, prior to the 1992 amendments, subsections 17(1) and (2) also conferred exclusive jurisdiction. They then drew the following inference:

> For paragraphs 17(3)(a) and (b) of the *FCA* to have had any meaning before February 1, 1992, they had to have meant that parties could confer jurisdiction on the Court in addition to the exclusive jurisdiction it already possessed to adjudicate claims against the federal Crown. There is no reason to interpret the paragraphs any differently now.[33]

On this view, subsection 17(3) is meaningless unless it is interpreted as expanding the Court's *in personam* jurisdiction to include defendants in addition to the federal Crown, which would include the provinces. The problem with this view is that the provision had never previously been interpreted in that way, either before or after the 1992 amendments, or at

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30 Paragraph 17(2)(a) provides that the Federal Court has concurrent jurisdiction in cases in which "the land, goods or money of *any person* is in the possession of the Crown" [emphasis added].

31 Section 19 is the only provision of the *Federal Courts Act* that expressly confers jurisdiction over the provinces, and applies only in relation to disputes between the Crowns. *Peigan* did not concern section 19, since the matter involved a dispute between a First Nation and a province.

32 It is notable that paragraph 17(3)(b)'s first incarnation became part of the *Exchequer Court Act* in 1924: *An Act to Amend the Exchequer Court Act*, RSC 1924, c 40, s 2. Parliament had already expressly addressed the question of how and when the Court would have jurisdiction over disputes involving the provinces with section 19's first incarnation in 1906: *An Act Respecting the Exchequer Court of Canada*, RSC 1906, c 140, s 32.

33 *Peigan*, *supra* note 2 at para 80.

any time since 1916 under its previous incarnations in the *Exchequer Court Act*.[34]

A more plausible interpretation is readily discernable. Subsection 17(1) confers jurisdiction to grant relief against Canada, and subsection 17(2) identifies certain types of cases in which relief can be granted. Subsection 17(3) allows Canada and any person to refer by consent certain questions to the Court for determination. It does not by itself create causes of action or confer jurisdiction to grant any "relief", which is a defined term in the *Federal Courts Act*.[35] Subsections 17(1) and (2) do that work. Rather, subsection 17(3) is a reference provision under which Canada and its subjects[36] may seek an opinion from the Court on questions it might not otherwise have statutory jurisdiction to determine. The provision has consistently been applied in this way both before and after the 1992 amendments.[37] It has

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[34] Section 20 of the *Exchequer Court Act* was amended in 1916 to add exclusive jurisdiction over "[e]very matter in which the Crown and any person interested therein have agreed that the Crown pay to such person an amount to be determined by the Exchequer Court:" *An Act to Amend the Exchequer Court Act*, RSC 1916, c 16, s 2. That amendment generally corresponds to the current paragraph 17(3)(a) of the *Federal Courts Act*. Section 20 of the *Exchequer Court Act* was further amended in 1924 to add the words "or any question of law or fact to which the Crown and any person have agreed in writing that any such question or law or fact shall be determined by the Exchequer Court," *supra* note 32. That addition generally corresponds to the current paragraph 17(3)(b) of the *Federal Courts Act*.

[35] "Relief" is defined in section 2 of the *Federal Courts Act*, *supra* note 10, as "every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise".

[36] This interpretation is supported by *McNamara Construction (Western) Ltd v R*, [1977] 2 SCR 654 at 659, 75 DLR (3d) 273, in which the Supreme Court characterized subsection 17(3) as conferring jurisdiction "through agreement in certain situations between the Crown *and a subject*" [emphasis added].

[37] See e.g. *R v Ottawa (City)*, [1947] Ex CR 118, [1947] 2 DLR 265 (whether municipal taxes apply to former owners of lands subsequently purchased by Canada); *Canada Warehousing Assn v R*, [1968] Ex CR 392, 54 CPR 35 (opinion on the meaning of a certain provision of the *Combines Investigation Act*, RSC 1952, c 314); *Canada v Scheer Ltd*, [1970] Ex CR 956, 1971 CarswellNat 352 (WL Can) (whether a certain federal regulation was invalid); *Re Canada (Commissioner of the Royal Canadian Mounted Police)*, [1993] 2 FC 351, [1993] FCJ No 163 (QL) (opinion on the jurisdiction of the RCMP Public Complaints Commission); *Gernhart v R*, 132 FTR 2, [1997] 2 CTC 23 (opinion on the constitutionality of a certain provision of the *Income Tax Act*, RSC 1985, c 1 (5th Supp)); *Re Canada (Privacy Commissioner)*, [1999] 2 FCR 543, 162 FTR 245, (opinion on the scope of the *Privacy Act*, RSC 1985, c P-21, and *Customs Act*, RSC 1985, c 1 (2nd Supp)); *W Ralston (Canada) Inc v MNR*, 2002 FCT 627, 221 FTR 30 (whether a certain refund was available under the *Excise Tax Act*, RSC 1985, c E-15); *Toronto Star Newspapers Ltd v Canada*, 2007 FC 128, [2007] 4 FCR 434 (opinion on the constitutionality of certain provisions of the *Canada Evidence Act*, RSC 1985, c C-5). These references were brought by Canada and its subjects. No province was involved. At paragraph 82 of its reasons, the Court in *Peigan* cited certain cases it viewed

never been necessary to read jurisdiction over the provinces into that provision for it to have meaning.

Thus, while paragraph 17(3)(b) allows the Court's jurisdiction to be expanded by agreement, it does not follow that Parliament intended to expand the Court's *in personam* jurisdiction under that provision. As noted above, the provision's wording—which limits the Court's jurisdiction to the federal Crown—suggests the opposite conclusion. The more plausible view is that Parliament's aim was to ensure that Canada and its subjects could bring matters before the Court beyond what was expressly provided for under the *Federal Courts Act*. The 1924 Hansard debates in relation to what is now paragraph 17(3)(b) are illuminating:

> Hon. ERNEST LAPOINTE (Minister of Justice) moved for leave to introduce Bill No. 116, to amend the Exchequer Court Act.
>
> He said: The purpose of this Bill is to widen the jurisdiction of the Exchequer Court to deal with matters which might be submitted to it after an arrangement or agreement between the Crown and other parties.
>
> Right Hon. ARTHUR MEIGHEN (Leader of the Opposition): Does the hon. minister mean between the Crown and another party to an action in the court?
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> Mr. LAPOINTE: The purpose is to widen the jurisdiction of the court, so that the Crown could submit to the Exchequer Court *any other question which is not already under their jurisdiction*, provided the other party agrees to it.
>
> Mr. MEIGHEN: Would the other party require to be a party of the action in the court *before* he could agree to it?
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> Mr. LAPOINTE: Yes.[38]

This pithy exchange clarifies that the objective was to allow parties already before the Court to submit "any other question" not otherwise within the

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as supporting its conclusion, all of which were brought under paragraph 17(3)(a) between Canada and it subjects: *Tuberfield v Canada*, 2012 FCA 170, 433 NR 236; *R v Crosson*, 169 FTR 218, 89 ACWS (3d) 593; *Bosa v Canada (AG)*, 2013 FC 793, 436 FTR 288; *Irving Refining Ltd v Canada (National Harbours Board)*, [1976] 2 FC 415, 1976 CarswellNat 34 (WL Can). No province was involved in these matters, which again belies any legislative intention under subsection 17(3) to expand the Court's jurisdiction to include the provinces.

[38] *House of Commons Debates*, 14th Parl, 3rd Sess, No 3 (19 May 1924) at 2259 [emphasis added]. See also *House of Commons Debates*, 14th Parl, 3rd Sess, No 4 (18 June 1924) at 3335–39, 3519–20. At no time during the debates was it stated expressly or by implication that the legislative intention behind the proposed provision was to expand the Court's *in personam* jurisdiction to include the provinces.

Court's authority to determine. The intent was to expand jurisdiction over questions, not parties, which is indeed reflected in the provision's wording.

The foregoing demonstrates that there is no express or implied grant of jurisdiction over the provinces under paragraph 17(3)(b). The first step of the ITO test was not satisfied in *Peigan*. The broader concern, however, is with the Court's approach to statutory interpretation in the matter, which is a marked departure from its historic restraint in exercising jurisdiction over the provinces. At no time did the Court consider whether the *words* of paragraph 17(3)(b) disclose a clear Parliamentary intention to bind the provinces, or allow the Court to grant any relief against a province at the suit of a subject.[39]

B) The Return of Split Jurisdiction

Recall that the 1992 amendments to section 17 were intended to address the problem of split jurisdiction by conferring concurrent, rather than exclusive, jurisdiction over claims against Canada. Suits could thereafter be brought against Canada and other defendants, including provinces, together in the provincial superior courts. Parliament addressed the problem of split jurisdiction by contracting the Federal Court's exclusive jurisdiction over Canada, not by expanding its jurisdiction over other defendants.

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[39] It is beyond the scope of this paper to thoroughly review the Court's decision in relation to the second and third branches of the ITO test. Those branches require that an existing body of federal law is essential for the disposition of the dispute, and that the law on which the case is based is a "law of Canada". The majority in *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 69, [2016] SCR 617, referred to those branches as imposing a "high threshold," and clarified that the "fact that the Federal Court may have to consider federal law as a necessary component is not alone sufficient; federal law must be 'essential to the disposition of the case'" [*Windsor*]. By contrast, the Federal Court of Appeal in *Peigan* held, at paras 69–71, that the TLE agreements "contemplate" the creation of additional reserve lands, which makes the claim "intimately connected" to the federal *Indian Act*, RSC 1985, c I-5. However, no explanation was given as to how the *Indian Act* was *essential* to decide the case, let alone how it *could* apply, without being *ultra vires*, to a claim about the purchase and sale of provincial lands. Also without explanation, the Court referred to the federal *Saskatchewan Treaty Land Entitlement Act*, SC 1993, c 11, and *Claim Settlements (Alberta and Saskatchewan) Implementation Act*, SC 2002, c 3, as being "engaged" by the claim. Moreover, that a federal statute might be "engaged" falls far below the high standard affirmed in *Windsor*, *supra* note 39. Subsequent to *Peigan*, the Saskatchewan Court of Queen's Bench issued its decision in *Muskoday First Nation v Saskatchewan*, 2016 SKQB 73, [2016] 3 CNLR 123 [*Muskoday*]. The First Nation in that matter likewise brought a claim against the Province for refusing to sell certain lands under the TLE agreements. The Court determined the substantive issues without referring to, let alone relying on, any federal legislation whatsoever.

The problem reemerged in *Peigan*. Whether by design or inadvertence, the exclusive jurisdiction conferred by subsection 17(3) was not changed in the 1992 amendments. That subsection continues to grant *exclusive* jurisdiction where "the Crown and any person" have agreed in writing to the Court's jurisdiction. If the Province was not within the provision's scope, then the Plaintiffs in *Peigan* would have had to split their claim against the two Crowns. Justices Gleason and Near put it this way:

> If Saskatchewan's interpretation were to be upheld, the absurd result would follow that the PFN and every First Nation signatory to a similar treaty land entitlement settlement agreement would need to commence two actions if it felt that the governments were not respecting their contractual commitments: one in the Federal Court against Canada and another in the provincial superior court against the province. Such a result cannot ever have been intended.[40]

Until *Peigan*, the Court had not previously allowed the prospect of split jurisdiction to influence whether it has jurisdiction over the provinces. The Court's approach to split jurisdiction and the provinces was perhaps best encapsulated in *Union Oil Co v Canada*, where Justice Collier held that "[t]he fact that one defendant is properly before the Court, and another party may be a necessary or desirable defendant, does not confer jurisdiction."[41]

Peigan is also out of step with the Supreme Court's recent decision in *Windsor (City) v Canadian Transit Co*.[42] At issue was whether the Federal Court had jurisdiction to grant a declaration that a certain municipal by-law was constitutionally inapplicable or inoperative in relation to a federal undertaking. The Federal Court of Appeal had endorsed a broad reading of the Court's jurisdiction in order to avoid the pitfalls of fragmented jurisdiction and to promote consistency in the interpretation of federal law.[43]

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40 *Peigan*, *supra* note 2 at para 61.

41 *Union Oil*, *supra* note 11. This statement was quoted with approval by the Supreme Court in *Newfoundland v Quebec (Commission Hydro Electrique)*, [1982] 2 SCR 79 at 92, 137 DLR (3d) 577 (Beetz J). It was quoted with approval more recently by the Federal Court of Appeal in *Toney*, *supra* note 15 at para 24. In *Vollant*, *supra* note 26 at para 5, while Justice Hugessen's preference would have been to add a province as an essential party to the dispute, he refused to do so because "the Act does not grant me this jurisdiction." The Court has at other times expressed sympathy for plaintiffs caught by split jurisdiction, but has accepted the problem as arising inevitably from the Court's limited statutory jurisdiction. See e.g. *Pacific Western Airlines Ltd v R*, [1979] 2 FC 476 at paras 48–50, 13 CPC 299; *Heafey v Canada*, 46 FTR 123, 2 WDCP (2d) 266; *Tkachenko v Canada*, 54 ACWS (3d) 753, [1995] FCJ No 474 at para 27 (QL) (FCTD), aff'd [1995] FCJ No 1561 (QL) (FCA).

42 *Windsor*, *supra* note 39.

43 *Canadian Transit Co v Windsor (City)*, 2015 FCA 88 at para 55, 384 DLR (4th) 547. It is worth recalling here the Court's brief flirtation in the 1980s with the concept of ancillary jurisdiction as a way to avoid split jurisdiction under section 17. In *Marshall v R*, [1986] 1 FC 437, 1985 CarswellNat 63 at paras 22, 25 (WL Can), the Court held that it had section

A majority of the Supreme Court overturned that decision and cautioned that such objectives cannot justify departing from the explicit language of the *Federal Courts Act*.[44]

The problem of split jurisdiction as it relates to subsections 17(1) and (2) of the *Federal Courts Act* was remedied legislatively, not by the Court.[45] If the same problem is created by the grant of exclusive jurisdiction over Canada under subsection 17(3), then it may likewise cry out for a legislative solution.

Subsection 17(3) is unique in that it also allows for a contractual solution. Just as certain parties are able to attorn to the Court's exclusive jurisdiction by agreement, they can also amend those agreements in order to avoid the problem of split jurisdiction, if and when it arises. A contractual solution was indeed suggested by the Court in *Peigan*. This was in response to its decision to strike certain parts of the claim on the basis they fell outside of what was contemplated by the attornment clause. The Court proposed that the parties amend the agreement in order to allow the entire claim to be brought in provincial superior court.[46]

A contractual solution would also be open for the parties to respond to the Court's limited jurisdiction under paragraph 17(3)(b), which binds only the federal Crown. In a similar TLE claim brought against Saskatchewan,

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17 jurisdiction to hear claims against both a subject and the federal Crown where the cause of action against those defendants was sufficiently "intertwined" [*Marshall*]. It reasoned that Parliament would not have intended for plaintiffs to have to split unified causes of action in multiparty proceedings between the Federal Court and provincial superior courts. *Marshall* was followed in *Wewayakum Indian Band v R*, [1987] 1 FC 155 at para 21, 5 FTR 13, in which the Court held that a "split in the case creates an excessive burden on the litigant, provokes two separate actions over the very same issues of fact and worse, might conceivably result in conflicting decisions." While *Marshall* and its progeny did not involve a defendant province, the Court's reliance on ancillary jurisdiction would have invited the Court to hear claims brought against a province under section 17 where they were sufficiently "intertwined" with claims against Canada. However, in *Varnam v Canada (Minister of National Health & Welfare)*, [1988] 2 FC 454 at paras 16, 17, 84 NR 163 (FCA), the Federal Court of Appeal unequivocally rejected the ancillary jurisdiction doctrine on the basis that it threatened to extend the Court's jurisdiction "beyond what has been clearly intended by the words of the statute." While sympathetic to plaintiffs caught by the prospect of split jurisdiction, the Court affirmed the need to maintain fidelity to its statutory limitations. For a more fulsome discussion of this period of the Court's history, see JM Evans & Brian Slattery, "Federal Jurisdiction—Pendant Parties—Aboriginal Title and Federal Common Law—Charter Challenges—Reform Proposals: *Roberts v. Canada*" (1989) 68:4 Can Bar Rev 817.

44 *Windsor*, *supra* note 39 at para 47.

45 A legislative solution was indeed suggested at the time by the Supreme Court in *Rudolf Wolff & Co v Canada*, [1990] 1 SCR 695 at 703, 69 DLR (4th) 392.

46 *Peigan*, *supra* note 2 at para 91.

the parties agreed to waive the attornment clause in order to remove any doubt that the First Nation could proceed against the Province in the Court of Queen's Bench, where it had initiated its claim.[47] The same measure would allow a First Nation to proceed in that court against both Crowns as a means of avoiding splitting the case. Such practical solutions are preferable to judicial fixes that stretch a court's jurisdiction beyond its statutory limits.

C) Waiver and the Crown's Honour

The Court in *Peigan* held that the Province waived Crown immunity by agreeing to the attornment clause. It was in the Court's discussion of the Crown's honour in this context that it expressed its displeasure with the Province's jurisdictional challenge. Saskatchewan had argued that provincial immunity meant that the attornment clause must be read down to apply only to disputes between Canada and the First Nation. The Court's answer was that the honour of the Crown prevented the Province from attempting to "re-write" the clause in this way, which would be contrary to its clear and unambiguous terms.[48] The Court was understandably indifferent to the cause of Crown immunity on these facts. However, its reliance on the Crown's honour marks a novel development in both the doctrines of waiver and the honour of the Crown.

It is beyond the scope of this discussion to fully review the doctrine of Crown waiver. However, it is clear that the doctrine is narrow and unforgiving, as indicated by Chief Justice Dickson in *Alberta Government Telephones v Canadian Radio-Television & Telecommunications Commission*: "Regretfully perhaps, but undeniably, the statutory Crown immunity doctrine does not lend itself to imaginative exceptions … however much such exceptions may conform to our intuitive sense of fairness."[49] There is no question that a province may waive immunity from a federal statute by taking the benefit of that statute.[50] There was no indication in *Peigan* that the Province had in any way taken the benefit of the *Federal Courts Act* so as to have waived immunity from the statute on that basis.

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47 *Muskoday*, *supra* note 39 at para 6.

48 *Peigan*, *supra* note 2 at para 64.

49 *Alberta Government Telephones*, *supra* note 29 at 291.

50 *Ibid* at 284–91. In *Alberta Government Telephones*, the Court considered whether a provincial Crown agent was subject to the regulatory authority of the Canadian Radio-television and Telecommunications Commission. The Court held, at 289, that while the provincial Crown agent had entered into agreements with federally regulated entities, it had not sufficiently relied on the benefits of any federal statute to have waived immunity. In *Sparling v Quebec (Caisee de depot & placement)*, [1988] 2 SCR 1015, 55 DLR (4th) 63, the Court held that a provincial Crown agent waived immunity by purchasing shares in a company regulated by the *Canada Business Corporations Act*, SC 1974–75–76, c 33, thereby implicitly accepting the benefits and burdens of that federal legislation.

It is also clear that Crown immunity may not shield a province from its contractual obligations. The Court in *Peigan* followed the Supreme Court's decision in *Bank of Montreal v Quebec (AG)* on this point.[51] The Supreme Court in that matter held that the *Bills of Exchange Act* governs and implies terms into banking contracts that can be enforced against a province.[52] However, *Peigan* gave rise to different issues than *Bank of Montreal*. Whereas there was no question in *Bank of Montreal* that the contract at issue was governed by a statute falling within exclusive federal jurisdiction over banking, it is far less clear whether any federal statute, let alone the *Federal Courts Act*, governs or implies terms into the TLE agreements. To the extent those agreements concern the purchase and sale of provincial lands, they fall within exclusive provincial jurisdiction. Further, there was no question in *Bank of Montreal* that the provincial superior courts had jurisdiction to enforce the contract and *Bills of Exchange Act* against the province.[53] In *Peigan*, however, whether the Federal Court had jurisdiction to enforce the TLE agreement against the Province was the very question at issue. The Court had no choice but to work through the ITO test regardless of the question of Crown waiver.[54]

The honour of the Crown had never previously been applied to the issue of Crown waiver, and is arguably an "imaginative exception" to the Crown immunity doctrine admonished against in *Alberta Government Telephones*. In *Manitoba Métis Federation Inc v Canada (AG)*, the Supreme Court reviewed the doctrine of the honour of the Crown and identified four situations in which it has been applied:

> 1. The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest;
>
> 2. The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest;
>
> 3. The honour of the Crown governs treaty-making and implementation, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing; and

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51 *Peigan*, *supra* note 2 at paras 54–57. *Bank of Montreal v Quebec*, [1979] 1 SCR 565, 96 DLR (3d) 586 [*Bank of Montreal*].

52 RSC 1970, c B-5.

53 *Bank of Montreal*, *supra* note 51.

54 As stated by Hogg, Monahan & Wright, *supra* note 14: "The Crown cannot waive an immunity from statute if the statute does not on its true interpretation apply to the Crown" (at 421, n 120).

> 4. The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples.[55]

The Court in *Peigan* held that the Crown's honour applies to the TLE agreements by virtue of the fourth scenario identified by the Supreme Court.[56] Justices Gleason and Near rightly observed that the TLE agreements are intended to fulfill Canada and Saskatchewan's respective constitutional obligations in relation to providing reserve lands. On that basis, they found that the doctrine prevented the Province from invoking Crown immunity in the face of the attornment clause.

In *Muskoday First Nation*, Justice Smith of the Court of Queen's Bench invoked the honour of the Crown as an interpretive lens when considering the purchase and sale provisions of the TLE agreements.[57] Those provisions are central to the acquisition of Crown lands by entitlement Bands. By contrast, an agreement to attorn to the Federal Court is unrelated to the constitutional obligations that backstop the TLE agreements. The attornment clause is better described simply as an unfortunate choice of forum. That all previous TLE disputes in Saskatchewan had been brought by entitlement Bands in the Court of Queen's Bench, despite the attornment clause, belies any underlying constitutional significance to either the clause or Federal Court jurisdiction.[58] While the Treaties are undoubtedly solemn agreements implicating the Crown's honour, the doctrine is stretched beyond recognition if it can clothe Federal Court jurisdiction with constitutional solemnity.[59]

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55 2013 SCC 14 at para 73, [2013] 1 SCR 623 [footnotes omitted].

56 *Peigan*, *supra* note 2 at paras 38–39.

57 *Muskoday First Nation*, *supra* note 39 at para 50. This finding is arguably no longer good law in light of the Saskatchewan Court of Appeal's subsequent decision in *Peter Ballantyne Cree Nation v Canada*, 2016 SKCA 124 at paras 46–48, 38 CCLT (4th) 45, leave to appeal to SCC refused, 37485 (22 June 2017) [*Peter Ballantyne*]. The Court held that, unlike the Treaties, paragraph 10 of the *NRTA* creates no special relationship with Aboriginal peoples that engages the Crown's honour.

58 *One Arrow First Nation v Saskatchewan*, [2000] 1 CNLR 162, 90 ACWS (3d) 665 (Sask QB); *Bear v Saskatchewan*, 2012 SKQB 232, [2012] 4 CNLR 53. English River First Nation initiated a TLE suit in Queen's Bench against Saskatchewan in 2009, which was discontinued in 2014. Gordon First Nation initiated a TLE suit in Queen's Bench against Canada and Saskatchewan in 2011. The author is not aware of any such attornment clause in TLE agreements from other provincial jurisdictions. The *Framework Agreement: Treaty Land Entitlement*, signed between Canada, Manitoba and various First Nations in that Province has a detailed dispute resolution procedure that includes binding arbitration, appeals from which are to be made under the agreement to the Manitoba Court of Queen's Bench.

59 The Court did not differentiate between the respective constitutional bases for Canada and Saskatchewan's participation in the TLE agreements. Saskatchewan's constitutional obligation arises not under the Treaties, but under paragraph 10 of the *NRTA*.

The doctrine could not save the attornment clause from being read down in any event, at least for disputes in which Canada is not named.[60] It is one thing to say that paragraph 17(3)(b) of the *Federal Courts Act* contemplates disputes over defendants *in addition to* Canada. It is another thing entirely to say that the Court has jurisdiction over those defendants *without* Canada also being named. Such an interpretation would make reference to "the Crown" in that provision meaningless. It is hard to see how the attornment clause, notwithstanding its broad wording, could apply to a dispute solely between a First Nation and the Province. Neither the clause, nor the honour of the Crown, can override the words of the statute.

5. Conclusion

Peigan is a landmark departure from the Court's historic fidelity to its statutory limitations in relation to the provinces. Never before had the Court assumed jurisdiction over a province under section 17 of the *Federal Courts Act*. Never before had the Crown's honour been invoked to support Federal Court jurisdiction. While the goal of avoiding fragmented jurisdiction was relied on by the Federal Court of Appeal recently in *Windsor*, a majority of the Supreme Court was unwilling to adopt that rationale as a basis for departing from the words of the statute.

The Federal Court of Appeal's reliance on such considerations in *Peigan* reveals that its primary concern was to hold the Province to its contractual undertaking. It preferred contractual over legislative intent. The result may appear justified given the unfulfilled constitutional obligations animating the modern TLE agreements. However, those obligations concern the acquisition of lands, and are unrelated to Federal Court jurisdiction. Moreover, *Peigan* is a concerning precedent. If jurisdiction is a function of the Court's perception of unfairness or dishonour, then it may become untethered from its statutory moorings in future cases.

The Court's better course in *Peigan* would have been to respect its statutory limits in relation to the provinces, and let the parties address the attendant jurisdictional issues by amending the agreement to allow disputes to be consolidated in provincial superior court. This would mirror previous legislative solutions to the Court's limited jurisdiction under section 17

That obligation is to Canada only. In *Peter Ballantyne*, *supra* note 57, the Saskatchewan Court of Appeal recently held that paragraph 10 does not engage the honour of the Crown.

[60] This is not a hypothetical scenario. Three TLE disputes have been brought by First Nations against the Province in Queen's Bench without Canada's participation: see note 58, above. Canada was struck as a party in one of those actions for want of a reasonable cause of action against it: *Muskoday First Nation v Saskatchewan*, 2010 SKQB 342, 193 ACWS (3d) 415.

of the *Federal Courts Act*. The Court's attempted judicial fix was both unprecedented and unnecessary.